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No. _____

In The

Supreme Court Of The United States

October Term, 1997

JEROME BERG,

Petitioner,

vs.

THE DENTISTS INSURANCE COMPANY,

Respondent

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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63 pp

QUESTION PRESENTED FOR REVIEW

Did Grogan v Gardner 498 U.S. 279 (1991) end the bankruptcy court's obligation to examine an old "fraud" judgment using the Brown v Felsen 442 U.S. 127 (1979) test of unfair procedure to make an independent determination about whether that judgment is dischargeable?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE NINTH CIRCUIT

Jerome Berg respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeal for the Ninth Circuit

OPINIONS BELOW

The appended opinions of the Bankruptcy Court (App. 1), the United States District Court (App. 3) the Court of Appeals (App. 13), and the order denying rehearing (App. 22) are all unpublished.

I. JURISDICTIONAL STATEMENT

The United States Bankruptcy Court had jurisdiction pursuant to 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(6). The United States District Court had subject matter jurisdiction based upon 28 U.S.C. § 158(c). The Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and Rule 54 Federal Rule of Civil Procedure. The decision appealed from is a final judgment, which disposed of the action as to all claims

by all parties, and is therefore appealable as of right. (See 28 U.S.C. § 1291; Rule 54 of the Federal Rules of Civil Procedure)

Summary judgment pursuant to Federal Rule of Civil Procedure Rule 56 was entered July 19, 1994 in the United States Bankruptcy Court.

The district court entered its order March 13, 1996.

The United States Court of Appeals for the Ninth Circuit filed its opinion November 3, 1997, and its order denying a Petition for Rehearing and Rehearing En Banc was filed December 16, 1997.

Jurisdiction of the United States Supreme Court is invoked pursuant to 42 U.S.C. § 1252.

II. STATUTORY PROVISIONS

This case presents issues framed by the following statutes:

1. 11 U.S.C. § 523(a)(2) states the relevant Bankruptcy Code fraud exception to discharge in pertinent part:

   11 USCS § 523. Exceptions to discharge
   (a) A discharge [under the Bankruptcy

> Code] does not discharge an individual debtor from any debt --
>
> * * *
>
> (2) for money . . . to the extent obtained, by --
> (A) false pretenses, a false representation, or actual fraud

2. California Civil Code § 2860 codifies common law entitlements to independent counsel when attorneys selected by an insurance company to defend its insured are in conflicts-of-interest with the insured. At issue in this case is the statutory level of conflict which requires appointment of independent counsel. Section 2860 defines that level:

> § 2860. Conflict of interest; duty to provide independent counsel; waiver; . . .
>
> (a) If the provisions of a policy of insurance impose a duty to defend upon an insurer to provide independent counsel to the insured, the insurer shall provide independent counsel to represent the insured unless, at the time the insured is informed that *a possible conflict may arise or does exist*, the insured expressly waives, in writing, the right to independent counsel. (Emphasis added.)

III. STATEMENT OF THE CASE

Petitioner was subjected to a judgment for fraud in a state court suit where he was forbidden a reasonable opportunity to defend. That judgment was made the subject of an adversary suit to deny a discharge in petitioner's bankruptcy.

The bankruptcy court entered summary judgment on the state court judgment ignoring the sworn factual offer of evidentiary proof including 44 pages of relevant exhibits submitted in opposition[1] which shows in meticulous detail how petitioner was denied a fair trial in the state court suit. Citing the bankruptcy court's unique responsibility over discharge petitioner requested the bankruptcy court to make the "unfairness" assessment called for by Brown v Felsen 442 U.S. 127 (1979) and Grogan (*supra*) as well as Ninth Circuit Court of Appeals precedent published after Grogan, In re Britton 950 F.2d 602 (9th Cir. 1991) which follows the process of unfairness evaluation described In re Houtman 568 F.2d 651

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1 And a 22 page point-by-point refutation of the moving party's statement of undisputed facts.

(9th Cir. 1978). The bankruptcy court refused to apply the unfairness test (App. 1).

Respondents objected to having the matter reviewed by the Bankruptcy Appellate Panel for the Ninth Circuit, so the appeal was resolved in the United States District Court (App. 3) which upheld the bankruptcy court's ruling.

The Ninth Circuit Court of Appeals appears to have accepted the fact that Petitioner's state case was unfair. (See App. 13) However, the Ninth Circuit Court of Appeals ruled that California law does not require an unfairness evaluation (App. 19-20), and Ninth Circuit precedent (Britton, (*supra*) and Houtman (*supra*)) need not be followed, but gave no reason for this departure from precedent.

IV. REASONS FOR GRANTING THE PETITION

A. Summary Judgment Procedure Was Misunderstood

Summary judgment is reviewed *de novo*. Celotex Corp. v Catrett, 477 U.S. 317, 324, 327, , (1986. The court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of

material fact and whether the bankruptcy court correctly applied the relevant substantive law.

B. The Non-Moving Party's Evidence Is To Be Believed

In Eastman Kodak Co. v Image Tech. Services (1992) 504 U.S. 451, this court held "the evidence of the non-moving party is to be believed, and all justifiable inferences are to be drawn in their favor," and ". . . respondents' version of any disputed fact is thus presumed correct . . . ."

C. Collateral Estoppel: *De Novo* Review: State Law Governs

The Court of Appeals reviews both *res judicata* and collateral estoppel claims *de novo*. See Pardo v Olson & Sons. Inc. 40 Fed.3d 1063, 1066 (9th Cir. (1994) (collateral estoppel); Miller v County of Santa Cruz 39 Fed.3d 1030, 1032 (9th Cir. 1994) cert. denied, 115 S.Ct. 2613 (1995) (*res judicata*).

Because the underlying judgment was rendered in state court, the court must apply California's *res judicata* and collateral estoppel principles to issues controlled by state law.

Kremer v Chemical Constr. Corp. (1982) 456 U.S. 461, 480-81.

Whether it was proper to give the state court judgment preclusive effect turns on whether appellant received due process by having a "full and fair" opportunity to litigate his defense in the California court. The Kremer court opinion (at 481) states:

> Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation. Montana v United States (*supra*) at 164, n. 11; 99 S.Ct. at 979, n. 11.[2] Cf. Gibson v Berryhill 411 U.S. 564; 93 S.Ct. 1689; 36 L.Ed.2d 488 (1973).

D. An Important Federal Question Which Was Raised From the Start Has Been Decided "In A Way That Conflicts With Applicable Decisions Of This Court" Regarding The Special Test For Non-Dischargeability Of Judgments. (Rule 10 of the Rules of the Supreme Court)

The bankruptcy court has primary jurisdiction over dischargeability. Sims v Jamison 67 F.2d 409 (9th Cir. 1993); Comer v Comer (In re Comer) 723 F.2d 737 (9th Cir. 1994).

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[2] Montana v U.S. (1979) 440 U.S. 147 [99 S.Ct. 907].

Grogan v Gardner (1991) 498 U.S. 279; notes that Brown v Felsen (*supra*) 137 ft. nt. 7 discusses the intention of Congress in taking dischargability issues from the state courts that the bankruptcy courts "develop expertise" in evaluating worthiness for discharge.

Grogan (*supra*) at fn. 11 cites Brown v Felsen (*supra*) without qualification. The rule in Brown is that the bankruptcy court *must* exercise its *exclusive* power over discharge to examine all relevant facts without being "confined to a review of the judgment and record in the prior state court proceeding." 442 U.S. 139-140. In re Houtman (*Supra*),and In re Britton (*Supra*) set the Ninth Circuit's standard for that unfairness review.

The memorandum order of the Court of Appeals (App. 13) does not adequately explain why the panel departed from settled law in this regard although the requirement of an "unfairness" review as expressed in Grogan (*supra*), Brown (*supra*), Britton (*supra*) and Houtman (*supra*) was discussed in briefs before that court and all the courts below.

V. ANALYSIS OF THE CIRCUIT COURT'S NOVEMBER 3, 1997 MEMORANDUM ORDER

At App. 19 the Court of Appeals approaches the unfairness issue:

> The nub of Berg's contention is that he qualifies for one of the Restatement (Second) exceptions to collateral estoppel by having been deprived of an adequate opportunity to obtain a full and fair adjudication in state court. See Restatement (Second) of Judgments § 28(5)(c). Berg argues that the state court's ruling that California Civil Code § 2860 released TDIC from any obligation to pay for Berg's costs and services after January 18, 1988 unfairly "gutted" his fraud defense.

The memorandum, as far as it goes, correctly states petitioner's position, but it doesn't mention the undisputed fact that the state court erroneously prevented petitioner from proving there was no fraud since the two-and-a-half years of work he was forbidden to testify about shows lack of intent to defraud, and TDIC suffered no damages because petitioner's clients were entitled by their TDIC contracts to his continuing services as their independent counsel.

VI. BACKGROUND

Petitioner is a lawyer who was "independent counsel" defending several dentists in approximately 40 suits for dental malpractice in which uninsurable elements of licensure violations and intentional misconduct were raised. Lawyers selected by respondent, The Dentists Insurance Company (TDIC), to defend these dentists were in conflict-of-interest because the cases could be "tipped" into outcomes for which insurance indemnification is forbidden by law. TDIC would profit from such results.

At the end of 1987 the California Legislature enacted Civil Code § 2860 which modified the common law right of an insured to independent counsel. Relying on that statute TDIC sent letters to petitioner and his clients (the TDIC insureds) cutting off compensation for independent counsel after the effective date of § 2860. As shown in the offer of proof opposing summary judgment, §2860 does not justify withdrawing independent counsel under the conflict-of-interest facts here. After receiving those letters petitioner did two-and-a-half years of work on those cases for which had been pre-

paid (based upon a billing system which anticipated the needed work).

TDIC sued petitioner claiming the pre-payment defrauded them. At trial petitioner was not allowed to produce that evidence of his additional two-and-a-half years of work after TDIC decided it had no further obligation to provide independent counsel to its insureds. This void in the evidence made the pre-payment appear to have been fraudulently procured.

That legal work was necessary as seen in the fact context of the possibly uninsured nature of the claims against petitioner's clients. They were entitled to "independent counsel" under their contracts with TDIC because the lawyers TDIC usually assigns to defend its insureds were in conflicts-of-interest. They could "tip" the cases to grounds for which indemnification by TDIC would be forbidden because two of petitioner's clients were charged with unlicensed performance of professional services and one was charged with an intentional wrongdoing scheme, by which dental work was done carelessly and hurriedly with knowledge that would have to be redone if

the patient complains. An angry dental assistant described that dental practice as a "meat factory."[3]

The state court erroneously forbade the evidence of two and a half years of work. To the jury it looked like petitioner was paid, but he did little work. If petitioner could prove he did this needed two-and-a-half years of work clearly TDIC suffered no damages.

The memorandum opinion goes on to say that even if the state court ruling was "patently erroneous"(App. 22) that error should not be the basis for denying preclusive effect to the unfair state judgment citing *Rest. Judgments 2d* § 28, comment j; (1982) and Martin v Martin (1970) 2 Cal. 3d 752, 762-763 [87 Cal. Rptr. 526, 533]. But it is not the erroneous ruling which inhibits preclusion; preclusion should be denied because the state court trial was unfair as a consequence of that error. Debtor was forbidden a fair chance to defend by bringing into

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[3] California law forbids insurance indemnification for violations of the medical and dental practice acts. See California Insurance Code § 253 and California Code of Civil Procedure §1029.8. Willful torts are excluded from indemnification by California Insurance Code §533. See the willful acts discussion in Taylor v Superior Court (1979) 24 Cal.3d 890, 905, 907 [157 Cal. Rptr. 693, 702, 704].

evidence proof that he did two-and-a-half years of work for which he was entitled to credit. If he gets credit for that work TDIC suffered no damages. In the absence of damages a fraud case lacks a critical element of proof, and can't be sustained.

In deciding the case based on Martin (*supra*) and comment j the Court of Appeals departed from this court's rulings on the subject as well as the circuit's published standard in dischargeability cases which requires an unfairness review. The unfairness issue is not addressed in the Martin case or in comment j of the *Rest. Judgments 2d* and neither deals with that special test in dischargeability cases.[4] See Brown (*supra*). Neither the bankruptcy court nor the district court weighed the unfairness of forbidding admission of most of petitioner's defense evidence leaving petitioner/debtor helpless without the right to introduce evidence showing non-fraudulent intent and

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[4] Miller (*supra*) cited in the memorandum is also not on point because injustice (unfairness) was not an issue in Miller. Youman v Caruso (1996) 51 Cal.App. 4th 401, 406 [59 Cal. Rptr. 2d 103, 106] cited in the memorandum at App. 18 is a legal malpractice case based on a criminal conviction. No unfairness issue was presented in Youman either. These case are irrelevant. It is axiomatic that cases are not authority for propositions not considered. See Webster v Fall (1925) 266 U.S. 507, 511.

that there were no damages although both parties focused upon the unfairness issue in their briefs. (Neither party cited Martin or comment j because they are both off the point of the dischargeability special test.)

VII. REASONS PRECLUSION IS NOT APPROPRIATE

Having decided the case on the irrelevant Miller grounds, the memorandum order overlooked the analysis which makes this case unsuitable for preclusion. Here is the outline of that analysis:

1. California Civil Code § 2860 was recently enacted when the state court made its erroneous orders depriving petitioner of a fair trial.
2. Before § 2860 became effective the TDIC insureds represented by petitioner were entitled to "independent counsel" to the conclusion of their litigation.
3. As interpreted in the state case § 2860 justified ending that right to independent counsel in the middle of the 40-plus cases petitioner was defending.

4. That interpretation violates U.S. Constitution Art I, § 10 against impairment of rights under TDIC's contracts with the insureds in which petitioner was a third party beneficiary. See Center Foundation v Chicago Ins. Co. (1991) 227 Cal. App. 3d 547 [278 Cal. Rptr. 13].

5. Based on that interpretation petitioner was forbidden to defend the fraud case by showing good intent and that there were no damages because he did the work during the two-and-a-half years the cases were pending after TDIC's "cut-off" letters.

6. Such a trial (where valid defenses are forbidden) is unfair.

7. On the issue of dischargeability the court re-examines the underlying case to see if discharge is appropriate; all the relevant evidence must be considered including the evidence excluded in the first (state) case. Brown (*supra*).

8. The reason for that careful review is that Congress made dischargeability a unique bankruptcy issue.

9. Law which does not arise in the special field of

dischargeability analysis is irrelevant.

VIII. DISCUSSION

A. Bankruptcy Policy Favors Discharge

The historic rule of bankruptcy law has been to construe exceptions to discharge strictly and narrowly. Gleason v Thaw (1915) 236 U.S. 558 (1915), also see Gregg v Rham (In re Rham) 641 Fed.2d 755, 756-757 (9th Cir. 1981) cert. denied 454 U.S. 860. There is a "strong presumption" that petitioner should receive a discharge. See In re Farrell 150 B.R. 116, 118 (B.C. D.C. NJ, 1992). The bankruptcy court has wide discretion in permitting a discharge -- on appeal an order permitting a discharge will be affirmed unless clearly erroneous. Johnson v Bockman 282 Fed.2d 544 (10th Cir. 1960) Also see In re Mason 709 Fed.2d 1313, 1319 (9th Cir. 1983) and In re Rogers (Bktcy C.D. Cal. 1990) 115 B.R. 678.

B. Discharge Of This Debt Is Reasonable Because, In Fact, There Were No Damages

Petitioner lost the state court case because he was not allowed to prove he did two-and-a-half years of work after the

"cut-off" letters from TDIC. He got no credit for that work. If that work were credited there would be no damages.

To prove a case of fraud under California law *each and every one* of the following elements must be established by clear and convincing evidence:

a. Misrepresentation (false representation, concealment, or non disclosure);

b. Knowledge of falsity (or "scienter");

c. Intent to defraud, i.e., to induce reliance;

d. Justifiable reliance; and

e. Resulting damage.

Witkin, *Summary of California Law*, 9th Ed., Torts §676.

C. Where Preclusion Is Sought Unfairness Is Tested In Many Instances Other Than Dischargeability Cases

This court notes that preclusion may be denied in cases where the first judgment was obtained unfairly. In Parklane Hosiery Co. Inc. , v Shore (1979) 439 U.S. 322, 331; 99 S.Ct. 645, 651 the court states:

> ...none of the (unfairness) circumstances that might justify reluctance to allow offensive use of

collateral estoppel is present.

California professional licensing law also requires the unfairness test for determining whether to give a judgment preclusive effect. In the Matter of Applicant A (State Bar Review Department (1995) 3 Cal. St. Bar Ct. Rptr. 318, 324, 329 such a review was expressly required at page 332:

> ...the hearing judge gave applicant *ample opportunity to demonstrate,* if she could, *that it would be unfair to bind her to the jury fraud finding* in the civil suit, by that applicant did not establish any unfairness. Accordingly, she was properly precluded from relitigating the underlying fraud issue in the State Bar Court. (Emphasis added.)

The unfairness test isn't an exclusive California test. In Bar Counsel v Board of Overseers (1995) 420 Mass. 6, 647 N.E. 2d 1182 a preclusion examination for unfairness of an old judgment was not performed. The Massachusetts Supreme Judicial Court set aside the decision and remanded the case to have the unfairness inquiry made.

D. State Law Governs *Res Judicata;* California Law Requires A Fairness Evaluation; The "Injustice" Exception

As explained in Robi v Five Platters, Inc. 838 F.2d 318, 322 (9th Cir. 1988) a state court judgment's susceptibility to being given preclusive effect must be decided under state law.

Witkin's 7 *California Procedure* 3d Ed; Judgment §275 and 4th Ed; Judgment §380 cite two cases that address California's injustice exception: U.S. Fire Insurance Co. v Johansen (1969) 270 Cal. App. 2d 824, 834 [76 Cal. Rptr. 174, 180] and Rutherford v State (1987) 188 Cal. App. 3d 1267, 1283 [233 Cal. Rptr. 781, 789]:

> [W]here a question of law essential to a judgment is actually litigated and resolved by a valid and final judgment, that determination will not collaterally stop the parties in a later action on a different cause of action, except where both causes of action arose out of the same subject matter or transaction *and no injustice would result.* (Emphasis added.)
>
> * * *
>
> [R]efusal to apply the doctrine of issue preclusion is justified . . . where a new determination is warranted in order to avoid the inequitable administration of the laws. (*Rest. Judgments 2d* § 28(2))

At App. 17 the circuit court's memorandum says:

> . . . the bankruptcy court must apply collateral estoppel on an issue *fully and fairly* litigated in another court. See Bugna v. McArthur (In re Bugna), 33 F.3d 1054, 1057-58 (9th Cir. 1994).

> "In determining the collateral estoppel effect of a state court judgment, federal courts must, as a matter of full faith and credit, apply that state's law of collateral estoppel." *Id.* at 1057. (Emphasis added.)

While Bugna did not present an unfairness issue, the Bugna court mentioned (at 1057) that debtor "had a full trial on the issue of fraud . . . ."

E. The Decision Of the Circuit Court Is Erroneous

The summary judgment question was whether petitioner's declaration establishes he had an unfair trial in state court where he was deprived of his defense. No court has expressly ruled on this issue, but the circuit court's memorandum order apparently assumes the state judgment was unfair (or that its unfairness is a matter of indifference.) See App. 20 of the memorandum order where Martin and *Rest. Judgments 2d* § 28(5)(c) comment j are quoted.

At this point the Court of Appeals took the wrong fork in the road by deciding the appeal on general collateral estoppel principles rather than on the specific special test applicable to instances of unfairness in dischargeability cases as noted by

Grogan (*supra*).

F. The Correct Method Of Preclusion Analysis

Decisional law provides the method by which *res judicata* requests must be processed in the bankruptcy court when the debtor claims the underlying judgment was procured unfairly. *Rest. Judgments 2d* § 28 (1982) sets forth the eight circumstances which must be considered by the bankruptcy judge when confronted with that question. Three § 28 tests are relevant here:

> (2) The issue is one of law and * * * (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or
>
> (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts * * *; or
>
> * * *
>
> (5) There is a clear and convincing need for a new determination of the issue * * * (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

In the bankruptcy court there should have been an evaluation of the legal error (unconstitutionally[5] relying on a new statute, California Civil Code § 2860 to end contract rights to a defense by non-conflicted, "independent counsel"), and the consequence of that error (an unfair trial where petitioner was forbidden a valid defense). The circuit court's memorandum suggests that the panel recognizes that legal error occurring in the state case produced an unfair judgment, but the panel is of the opinion that the error and the unfair judgment don't impede preclusion. In other words, the panel decided that Grogan invalidated the *Rest. Judgments 2d* § 28(2), (3), (5) unfairness tests of a fraud judgment for possible dischargeability.

Petitioner has demonstrated that *Rest. Judgments 2d* § 28 test 2, 3 and 5 favor him. In a fair forum he would be allowed to prove he did the work to which his clients were entitled after TDIC sought to end its responsibility for their independent counsel, that the work was necessary, and therefore, TDIC suffered no damages.

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[5] Legislative impairment of contracts is forbidden by U.S. Const. Art. I § 10.

Assuming in a fair trial debtor/petitioner could prove TDIC suffered no damages is to fair to deny him a discharge? Of course not.

G. Examples Of The Correct Method Being Applied In The Ninth Circuit

The correct procedure for dealing with a *res judicata* contention where unfairness is asserted to prevent preclusion was observed in In re Britton (*supra*) which at 606 cites Grogan (*supra*). On the first page of Britton the court said, "The bankruptcy court held a hearing to determine dischargeability of the [judgment] debt" (which was for medical negligence and fraud relating to an abdominal lipectomy ("tummy tuck") cosmetic surgery in which Britton, a non-licensed person, was presented as a "doctor."[6] The Britton opinion describes the bankruptcy court trial evidence of the botched surgery in graphic detail.

In re Houtman (*supra*) also is a case where the

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[6] Two of petitioner's clients insured by TDIC faced similar charges of unlicensed healthcare practice.

bankruptcy court held a trial and took testimony on the fraud issue (at 568 F.2d 653).

H. Petitioner Made A Good Record To Deny Summary Judgment

Petitioner's declaration in opposition to summary judgment provided the bankruptcy court with an offer of proof including 44 pages of evidentiary materials extrinsic to the judgment establishing a fact dispute (unfairness of the "fraud" case in state court) which precludes summary judgment. In addition, petitioner filed an outline of prospective expert testimony. Together these materials show that petitioner has a good fact-based defense to the nondischargeability suit relying on Brown *(supra)*, Britton, Houtman and the *res adjudicata* exceptions as summarized in *Restatement of Judgments*, 2d, § 28, which is applied in California.[7]

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[7] At App. 15 the memorandum refers to unsuccessful efforts by petitioner to seek review of the unpublished California Court of Appeal decision in the California Supreme Court and this court. Denial of review of an unpublished state court judgment by the California Supreme Court and the U.S. Supreme Court does not have the effect of approval. "An order denying a petition for *certiorari* expresses no opinion on

I. Petitioner Addressed The Brown v Felsen Issue In The Bankruptcy Court

The evidence presented in response to the motion for summary judgment supports petitioner's right to a careful evaluation in the bankruptcy court of the facts outside the record of the state court which is the correct procedure in evaluating the right to a discharge. This procedure is explained by Justice Blackmun in Brown v Felsen (*supra*) at 138-139. A bankruptcy court

> is not confined to a review of the judgment and record in the prior state court proceedings when considering the dischargeability of respondent's debts.

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the merits of the case." (See Carpenter v Gomez (1995) 116 S.Ct. 488 and Singleton v Comm'r. (1978) 439 U.S. 940, 942-946, 99 S.Ct. 335.) No inference may readily be drawn from a decision to deny review. The grounds for discretionary review are limited, and an order of denial of review is seldom explained or qualified. See People v. Davis (1905) 147 Cal. 346, 348 [81 P. 718]; 9 Witkin, *California Procedure*, 3d Ed., Appeal §§ 696, 706. Only 5% of the petitions for review filed in the California Supreme Court are granted. *Supreme Court of California Practices and Procedure*, 1997 page 19.

Non-review is much less significant as to an unpublished case (such as the underlying decision in AO57488) because it cannot be cited by others. See Rule 977 of the California Rules of Court.

Justice Blackmun goes on to show (at footnote 6 on page 133), that before Congress made dischargeability an exclusive federal issue, California refused to apply *res judicata* in determining dischargeability of judgment debts citing U.S. Credit Bureau v Manning 147 Cal.App 2d 558, 562 [305 P.2d 970, 973] (1957) which includes this statement:

> We conclude that the origin of the indebtedness evidence by the note on which the judgment was obtained may be proved by evidence dehors[8] the record of that case.

CONCLUSION

Debtor/petitioner provided the bankruptcy court with a detailed sworn declaration of facts -- an offer of proof that shows he was denied a fair trial in the old state fraud case, a 22 page point-by-point statement of disputed facts, and expert evaluations of the law entitling insureds to independent counsel when lawyers selected by the insurance company are in

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[8] "Dehors L., Fr. Out of; without; beyond; foreign to; unconnected with. Blackford v Anderson 226 Iowa 1138, 286 N.W. 735, 746. Dehors the record; foreign to the record. 311. Comm. 387" *Black's Law Dictionary* 4th Ed., 1951.

conflicts-of-interest adequate to forestall summary judgment. This offer of proof shows that discharge should be allowed because TDIC suffered no damages. Petitioner did all the work for which he was paid, and that work was needed.

The bankruptcy court did not conduct an unfairness examination of the state court judgment as required by Grogan (*supra*) and ninth circuit precedent. The district court did not evaluate the unfairness claim, and in its memorandum the circuit's panel apparently accepted the fact that the state judgment was procured unfairly, but disregarding this court's precedent, decided that an unfair trial in the prior case will no longer be a proper concern of the bankruptcy system when evaluating an old "fraud" judgment for dischargeability.

PRAYER

Certiorari should be granted to allow review of the erroneous application of Brown on the issue of preclusion regarding unfair judgments.

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The case should be remanded to the bankruptcy court with instructions to conduct an "unfairness" evaluation.

Date: March 12, 1998

Jerome Berg, Petitioner

APPENDIX A

IN THE UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

Filed July 19, 1994

In re JEROME BERG,	)
Debtor,	)
	) Case No. 93-32500 BDM
THE DENTISTS INSURANCE	) Chapter 11
COMPANY	) Adv. No. 93 3 509 TC
Plaintiff.	) JUDGMENT
v.	)
JEROME BERG,	)
Defendant	)
	)

The motion of The Dentists Insurance Company for summary judgment came on for hearing pursuant to notice on June 24, 1994. Mark Rorem appeared for plaintiff, The Dentists Insurance Company, and Jerome Berg appeared in pro per. The court having considered the briefs of the parties and heard oral argument hereby enters judgment as follows:

The judgment in favor of The Dentists Insurance Company against Jerome Berg in San Francisco County Superior Court Action No. 343657 is adjudged to be nondischargeable

pursuant to 11U.S.C. § 523(a)(2) and shall not be discharged in thls case.

The court finds in favor of The Dentists Insurance Company on the cross-claim of Jerome Berg.

Plaintiff shall recover its costs upon proper and timely application $_____.

Date: July 18, 1994 THOMAS E. CARLSON

JUDGE OF THE BANKRUPTCY COURT

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

(Filed March 13, 1996)

JEROME BERG, Debtor,	)
	) No. C 95-2626-LEW
THE DENTISTS INSURANCE COMPANY Plaintiff-Appellant.	) ORDER AFFIRMING) JUDGMENT OF) UNITED STATES
v.	) BANKRUPTCY COURT
JEROME BERG, Defendant-Appellee	)

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

This is an appeal from an order of the United States Bankruptcy:Court for the Northern Digtrict of California regarding the dischargeability of a California judqment. Defendant/Appellant Jerome Berg ("Berg") appeals from the judgment of the bankruptcy court granting summary judgment for Plaintiff/Appellee The Dentists Insurance Company ("TDIC") that the California judgment is nondischargeable in

bankruptcy.

This Court has jurisdiction under 28 U.S.C. S 158(c). After consideration of the record on appeal, the parties' papers, and arguments of counsel, the bankruptcy court's judgment is AFFIRMED.

Statement of Facts

Prior to January 1988, Berg worked as independent or Cumis counsel, at TDIC's expense, in approximately 41 malpractice actions against dentists insured by TDIC. (Excerpt of Record at page 45 ("ER 45")) Late in 1987, TDIC became aware that Berg overcharged TDIC for his services. (ER 45) TDIC'S review of Berg's billing statements in the 41 cases revealed that on some occasions, the total time billed TDIC exceeded 24 hours in one day. (ER 46) In January 1988, TDIC informed Berg that his services were no longer necessary due to the enactment of California Civil Code section 2860. (ER 46)

In September 1988, TDIC filed a complaint in state court against Berg alleging causes of action for fraud, negligent misrepresentation, breach of oral contract, breach of the covenant of gocd faith and fair dealing, restitution, and money

had and received. (ER 69) Berg filed a cross-complaint against TDIC alleging breach of contract, interference with contractual relations and emotional distress, claiming he was entitled to payment for services after January 1, 1988 as damages. (ER 46)

Following a twelve-day trial, the jury was instructed on the elements of fraud and deceit. (ER 61, 54-55) The court also instructed the jury that if it found fraud or deceit, it must determine additionally whether Berg acted with oppression, fraud or malice in the conduct upon which it based its finding of liability. (ER 59-60) The jury found for TDIC and awarded it $282,024.86 in compensatory damages. (ER 67, 71) In answer to three special interrogatories, the jury found by clear and convincing evidence that Berg acted with oppression, fraud and malice by overbilling TDIC but assessed no punitive damages against Berg. (ER 67-68) The trial court entered judgment in favor of TDIC in the amount of $322,960.02 on February 27, 1993. (ER 68)

On July 30, 1993, the California Court of Appeal affirmed the judgment. (Id. at 69) The Court of Appeal denied Berg's petition for rehearing. (ER 473) The California Supreme

Court denied Berg's petition for review (ER 89) and the United States Supreme Court denied Berg's petition for writ of certiorari (ER 90).

Thereafter, Berg filed a petition for bankruptcy in the United States Bankruptcy Court for the Northern District of California.(ER 8) On November 4, 1993, TDIC filed a nondischargeability complaint against Berg in the United States Bankruptcy Court for the Northern District of California alleging that the California judgment was nondischargeable under 11 U.S.C. sections 523(a)(2)(A) and-523(a)(6). (ER 7-10) Berg answered and f for damages and equitable relief. (ER 14, 17).

TDIC moved for summary judgment on its complaint on the grounds that the California judgment for fraud was entitled to full faith and credit under the doctrine of collateral estoppel. (ER 29-30) TDIC also moved for summary judgment on Berg's cross-claim on the grounds that the claims already had been litigated in the state court action. (ER 30) On July 18, 1994, the bankruptcy court granted TDIC's motion and adjudged the California judgment to be nondischargeable pursuant to 11

U.S.C. section 523(a)(2). (ER 987-88) Accordingly, the bankruptcy court entered judgment in TDIC's favor on the complaint and cross-claim. (ER 987-88) Berg filed the instant appeal.

Discussion

A. Standard of Review

A bankruptcy court's decision to grant summary judgment is reviewed de novo. In re Nourbakhsh, 67 F.3d 798, 800 (9th Cir. 1995). A reviewing court must determine whether the bankruptcy court correctly concluded that there was no genuine issue of material fact and that the moving party was entitled to judgment as a matter of law. Id.

B. Analysis

Berg contends that the bankruptcy court erred by granting summary judgment for TDIC on the dischargeability of the state court judgment because it was required to consider evidence extrinsic to the state court judgment. This argument lacks merit.

Under the bankruptcy statute, a discharge in bankruptcy does not discharge a debtor-from any debt for

money obtained by fraud. 11 U.S.C. S 523(a)(2)(A). Nondischargeability of a state court judgment may be determined on principles of collateral estoppel. Grogan v Garner, 498 U.S. 279, 284 & n.11, 111 S. Ct. 654, 658 & n.11; In re Bugna, 33 F.3d 1054, 1056 (9th Cir. 1994). If the elements of collateral estoppel are met, the bankruptcy court must apply the full faith and credit doctrine to the state court judgment. Bugna, 33 F.3d at 1057-58.

"In determining the collateral estoppel effect court judgment, federal courts must, as matter of law, apply that state's law of collateral estoppel." Id. at 1057. Here, California law governs the collateral estoppel effect of the state court fraud judgment. In California, collateral estoppel bars relitigation when "(1) the identical issue is under consideration; (2) a final judgment was reached on the merits in the earlier adjudication; and (3) the party against whom that judgment is now asserted was a party . . . in the prior action." Bell Gardens v. County of Los Angeles, 283 Cal.Rptr. 91, 93 (Cal. App. 1991); Garrett v. City and County of San Francisco, 818 F.2d 1515, 1520 (9th Cir. 1987).

Here, the latter two elements of collateral estoppel are satisfied readily. TDIC sued Berg for fraudulent overbilling in California state court. After a twelve-day trial litigated by both sides, the jury found in favor of TDIC. Final judgment was entered against Berg. The Court of Appeal affirmed the judgment and the California Supreme Court denied review. The only question remaining, therefore, is whether the issues decided in the state court action were identical to the fraud issue raised by 11 U.S.C. section 523(a)(2)(A).

TDIC's state court action against Berg proceeded on a fraud theory. The court instructed the jury, on the elements of fraud. The court further instructed the jury that if it found fraud or deceit, it was required also to determine whether Berg acted with oppression fraud or malice. Although the jury returned a general verdict in which it did not state the theory upon which TDIC prevailed, it specifically found that Berg acted with oppression fraud and malice when he overbilled TDIC when it responded affirmatively to three special interrogatories. The jury instructions only required the jury to answer the three interrogatories if it found that Berg fraudulently overbilled

TDIC. Thus, the issue decided in the state court action was identical to the fraud issue before the bankruptcy court.[1]

Misreading Brown v. Felsen, 442 U.S. 127, 99 S. Ct. 2205 (1979), Berg contends that the bankruptcy court was compelled to consider evidence extrinsic to the judgment in determining the collateral estoppel effect of the California judgment. In Brown, the state court did not adjudicate the issue of fraud. Judgment was based upon a stipulation and did not mention fraud. Id. at 128, 99 S. Ct. at 2207. The Supreme Court held that bankruptcy courts are not bound by state court judgments under the doctrine of res judicata when considering the dischargeability of a debt. Id. at 128, 99 S. Ct. at 2213.

The Court, however, left open the question whether bankruptcy courts should give collateral estoppel effect to state court judgments: "This case-concerns res judicata only, and not

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[1] Because the jury was instructed on the elements of fraud, including damages and justifiable reliance, Berg is not entitled to relitigate these issues. See Bugna, 33 F.3d at 1058 ("The bankruptcy court's otherwise broad powers do not include the power to reject a party's invocation of collateral estoppel on an issue fully and fairly litigated in another court."). Moreover, the California Court of Appeal affirmed the compensatory damage award, holding that the award did not suggest passion, prejudice or corruption. (ER 87)

the narrower principle of collateral estoppel." Id. at 2213 n.11. Recently, the Court answered the question affirmatively: "We now clarify that collateral estoppel principles do indeed apply in discharge proceedings pursuant to section 523(a)." Grogan, 498 U.S. at 284-85 n.11, 111 S. Ct. at 658 n.11. Thus, Brown does not require the bankruptcy court to consider evidence extrinsic to the judgment. Once the bankruptcy court determined that collateral estoppel barred relitigation of the fraud issue, it was bound to give full faith and credit to the California judgment. See In re Nourbakhsh, 67 F.3d at 801. The bankruptcy court did not err when it determined that collateral estoppel bars relitigation of the fraud issue.[2]

Berg's cross-claim also is barred by collateral estoppel because it is based upon his argument that TDIC was not entitled to terminate his services pursuant to California Civil Code § 2860. This issue also was fully litigated in the state court action, and Berg received a fair trial at the state level. The

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[2] The Court also rejects Berg's argument that the Bankruptcy Code's "fresh start" policy favors discharge of the debt. This policy is limited to the "honest but unfortunate debtor." Grogan, 498 U.S. at 286, 111 S. Ct. at 659.

state trial court granted TDIC's motion for summary adjudication of Berg's claim that it owed him money for services rendered after January 1988. (E.R. 209) The California Court of Appeal rejected Berg's argument that TDIC was required to continue furnishing Cumis counsel after the passage of California Civil Code S 2860. (ER 71-79) Thus, collateral estoppel bars relitigation of Berg's claim as well.

Accordingly, the judgment of the bankruptcy court is AFFIRMED.

IT IS SO ORDERED.

DATED: 7 March, 1996 /s/LAUGHLIN E. WATERS

Senior United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

Filed November 3, 1997

In re JEROME BERG,	)
Debtor,	)
	) No. 96-15751
THE DENTISTS INSURANCE	) DC No. CV-95-02626-
COMPANY	) MMC
Plaintiff-Appellant.	) MEMORANDUM*
v.	)
JEROME BERG,	)
Defendant-Appellee	)
	)

Appeal from the United States District Court for the Northern District of California

Maxine M. Chesney, District Judge, Presiding

Submitted,** July 18, 1997

San Francisco, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel finds this case appropriate for submission without argument pursuant to 9th Cir. R. 34-4 and Fed. R. App. P. 34(a)

Before: SNEED, HALL and WIGGINS, Circuit Judges.

Jerome Berg appeals from the district court's judgment affirming the bankruptcy court's grant of summary judgment for The Dentist Insurance Company ("TDIC"). Berg contends that the bankruptcy court erred by giving the 1992 state court fraud judgment preclusive effect in TDIC'S nondischargeability proceeding. The district court's judgment is affirmed.

BACKGROUND

In November 1985, after several of TDIC's insureds became embroiled in malpractice actions, TDIC retained Jerome Berg to serve as cumis counsel. In 1987, TDIC paid Berg $193,823.46 for services and expenses. A subsequent investigation into Berg's billing practices led TDIC to believe it had been overcharged. On January 1, 1988, after California Civil Code § 2860 became effective, TDIC concluded that section 2860 released it of any obligation to provide its insureds with cumis counsel in the malpractice suits. In a "cut-off" letter of January 18, 1988, TDIC put Berg and the insureds on notice that it would no longer pay for cumis counsel. From January 19,

1988 through May 1988, Berg continued billing TDIC for services he allegedly performed in 1987. TDIC paid Berg an additional $163,201.40.

TDIC sued Berg in California superior court for actual fraud, malice and deceit. Berg cross-complained against TDIC for recovery of services performed after January 18, 1988. The trial judge granted TDIC summary adjudication on Berg's cross-complaint on the ground that TDIC's reliance on California Civil Code § 2B60 released it of any obligation to pay for Berg's services after January 18th. The jury awarded TDIC $282,024.86 in compensatory damages and $40,935.16 in costs, but awarded no punitive damages. Berg's motion for judgment n.o.v. or a new trial, challenging the constitutionality of California Civil Code § 2860 was denied. Berg appealed the fraud issue, the constitutionality issue, and the issues raised in his cross-complaint, to the California Court of Appeals and California Supreme Court. His writ of certiorari to the United States Supreme Court was denied.

Berg filed for bankruptcy protection and TDIC initiated a nondischargeability action pursuant to 11 U.S.C. §§

523ta)(2)(A) & 523(a)(6). Berg's cross-complained against TDIC, raising the identical issues he previously raised in state court, i.e., whether California Civil Code § 2860 was constitutional and whether he should recover for his work as cumis counsel after January 18, 1988. TDIC moved for summary judgment under the doctrine of collateral estoppel. The bankruptcy court granted summary judgment in favor of TDIC and held the fraud judgment to be nondischargeable under 11 U.S.C. § 523(a)(2). The district court affirmed and Berg timely appeals.

II.

DISCUSSION

Berg contends that the state court fraud judgment should not be given preclusive effect because Berg lacked a full and fair adjudication in state court. We disagree.

We independently review the bankruptcy court's ruling on appeal from the district court. See Levin v. MaYa Constr. (In re Maya Constr. Co.), 78 F.3d 1395, 1398 (9th Cir.), cert. denied, 117 S. Ct. 168 (1996). We review the bankruptcy court's

conclusions of law de novo. See Alsbera v. Robertson (In re Alsbera), 68 F.3d 312, 314 (9th Cir. 1995), cert. denied. 116 5. Ct. 1568 (1996).

Collateral estoppel principles apply in bankruptcy discharge exception proceedings. See Grogan v. Garner, 498 U.S. 279, 284-85 & n.11 (1991). So long as the creditor invokes collateral estoppel and demonstrates that its elements are satisfied, the bankruptcy court must apply collateral estoppel on an issue fully and fairly litigated in another court. See Bugna v. McArthur (In re Bugna), 33 F.3d 1054, 1057-58 (9th Cir. 1994). "In determining the collateral estoppel effect of a state court judgment, federal courts mus., as a matter of full faith and credit, apply that state's law of collateral estoppel." Id. at 1057.

Under California law, "collateral estoppel bars relitigation when '(1) the issue decided in the prior action is identical to the issue presented in the second action; (2) there was a final judgment on the merits; and (3) the party against whom estoppel is asserted was a party . . . to the prior adjudication,'" Id. (quoting Garrett v. City and County of San

Francisco, 818 F.2d 1515, 1520 (9th Cir. 1987)). The court must additionally consider whether application of collateral estoppel advances public policy considerations. See Younan v. Caruso, 59 Cal.Rptr.2d 103, 106 (Cal. Ct. App. 1996).

A. The Fraud Issue

In its summary judgment motion, TDIC satisfied the elements of collateral estoppel on the fraud issue. First, the fraud issue in the nondischargeabillty proceeding was identical to the fraud issue in TDIC's state court action. See In Re Bugna, 33 F.3d at 1057; see also Cowen v Kennedy (In re Kennedy) 108 F.3d 1015, 1018 n.2 (9th Cir. 1997). Second, the issue of fraud in TDIC's state court suit resulted in a final judgment on the merits. See In re Bugna 33 F.3d at 1057. Third, Berg was a party to the state court adjudication of the fraud issue. See *id.* Finally, public policy considerations, such as guarding against inconsistent judgments, justified application of collateral estoppel to the fraud issue. See *id.*

B. Berg's Cross-Complaint

TDIC additionally satisfied the elements of collateral estoppel with regard to the issues raised in Berg's cross-

complaint. First, the issues Berg raised in his bankruptcy court cross-complaint, i.e., the constitutionality of California Civil Code § 2860 and whether TDIC owed Berg for services performed after January 18, 1998, were identical to the issues Berg raised in the state court action. See In re Bugna 33 F.3d at 1057. Second, the issues Berg previously raised in state court resulted in a final judgment on the merits. Third, Berg was a party to the state court suit. Finally, the public policy considerations justified application of collateral estoppel to the issues raised in Berg's cross-complaint. See *id.*

Berg, citing the Restatement (Second) of Judgments 2d § 28 (1982), nevertheless contends that collateral estoppel should not be applied to the fraud issue. We disagree.

The nub of Berg's contention is that he qualifies for one of the Restatement (Second) exceptions to collateral estoppel by having been deprived of an adequate opportunity to obtain a full and fair adjudication in state court. See Restatement (Second) of Judgments 2d § 28(5)(c). Berg argues that the state court's ruling that California Civil Code § 2860 released TDIC from any obligation to pay for Berg's costs and services after

January 18, 1988 unfairly "gutted" his fraud defense. The Restatement (Second) commentary, however, specifically states that "a refusal to give the first judgment preclusive effect . . . should [not be] based simply on a conclusion that the first determination was patently erroneous." See Restatement (Second) of Judgments 2d § 28 cmt. j (1982). Furthermore, under California law, a final judgment is entitled to collateral estoppel effect regardless of our agreement with the decision itself. See Martin v Martin 87 Cal. Rptr. 526, 533 (Cal. 1970) (under doctrine of collateral estoppel, an erroneous judgment is as conclusive as a correct one). Accordingly, we find Berg's Restatement (Second) of Judgments argument unpersuasive.[1] finally, Berg contends that the bankruptcy court erred by failing to consider matters extrinsic to the state court judgment under Brown v Felsen 422 U.S. 127 (1979). However, because TDIC's

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[1] Berg posits various arguments in an attempt to show that the state court judgment was erroneously decided. However, because Berg's arguments were previously raised and decided in state court, he is estopped from raising such issues in the bankruptcy court. See In re Bugna 33 F.3d at 1057-58. Morever, a showing of error in the state court judgment does not mitigate against the application of collateral estoppel. See Martin 87 Cal. Rptr. at 533.

state court judgment was specifically based on a finding of fraud, Berg's reliance on Brown is misplaced. See Id. at 139 n.10.

Accordingly, both the district court and bankruptcy court correctly concluded that, pursuant to collateral estoppel, the debt Berg owed TDIC was a debt for money obtained by fraud under 11 U.S.C. § 523(a)(2)(A), and consequently nondischargeable. See Grogan, 498 U.S. at 285 & n.11; see also In re Bugna, 33 F.3d at 1057-58.

AFFIRMED.

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed December 16, 1997

JEROME BERG,	)
Debtor,	)
	) No. 96-15751
THE DENTISTS INSURANCE	) DC No. CV-95-02626-
COMPANY	) MMC
Plaintiff-Appellant.	) ORDER
v.	)
JEROME BERG,	)
Defendant-Appellee	)
	)

Before: SNEED, HALL, and WIGGINS, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no active judge has requested a vote on

whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.